

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 9, 2009

IN RE Nathan P., Cassandra A., and Randy A.

**Appeal from the Circuit Court of Polk County
No. CV-08-005 Larry H. Puckett, Judge**

No. E2008-02344-COA-R3-PT - Filed July 15, 2009

The State of Tennessee Department of Children's Services ("DCS") filed a petition seeking to terminate the parental rights of Pamela M.A. ("Mother")¹ to the minor children:² Nathan P., Cassandra A., and Randy A. After a bench trial, the Trial Court found and held, *inter alia*, that the State had proved by clear and convincing evidence that grounds for termination exist pursuant to Tenn. Code Ann. §§ 36-1-113 (g)(2),(3),(8)&37-2-403(a)(2), and had proved by clear and convincing evidence that termination of Mother's parental rights is in the children's best interest. Mother appeals the Trial Court's termination of her parental rights. For the reasons set forth in this opinion, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of Circuit Court
Affirmed; Case Remanded**

JOHN W. McCLARTY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and CHARLES D. SUSANO, JR., J., joined.

Sally C. Love, Cleveland, Tennessee, for the Appellant, Pamela M.A.

Robert E. Cooper, Jr. Attorney General and Reporter, and Jill Z. Grim, Assistant Attorney General, Nashville, Tennessee, for the Appellee, State of Tennessee Department of Children's Services.

Joseph K. Byrd, Cleveland, Tennessee, guardian *ad litem*.

¹First names and last name initials will be used to protect the anonymity of the children discussed in this matter.

²Nathan P., Sr. surrendered his parental rights to his son, Nathan P. on September 25, 2007. Ronald A., father of Cassandra A. and Randy A., is working on a reunification plan with DCS regarding his two children and no petition for termination has been filed against him. Thus, neither father is a party to this appeal.

OPINION

I.

Factual Background

This case involves DCS's petition to terminate the parental rights of Mother as to her minor children: Nathan P., born December 3, 2003; Cassandra A., born November 9, 2000; and Randy A., born November 20, 1997 (collectively, "the children"). The children were placed in State custody for eleven months in 2004, several months in 2005, and from December 2006 to the present.

A. The February 2004 Removal

The records show that the children were first removed from Mother by DCS and placed in State custody in February 2004. The Preliminary Hearing Order issued by the Bradley County Juvenile Court made the following pertinent findings:

1. There exists probable cause that the subject children are dependent and neglected within the meaning of T.C.A. 37-1-102 (b)(12), in that the child, [Nathan P.,] is suffering from among other things, non-organic failure to thrive with other complications; the children are subject to environmental neglect and the [Mother] appears unable or unwilling to see to their health, safety and welfare.
2. The [DCS] has provided reasonable efforts to prevent removal of these children. Its efforts were unsuccessful and the [Mother] refused to accept services.

The Juvenile Court found it was in the children's best interest to remain in the care, custody, and control of DCS. The children stayed in DCS custody until January 2005, at which time the Bradley County Juvenile Court Judge returned the children to the Mother.

B. The May 2005 Removal

The records further show the children were again removed by DCS following a protective custody order from the Bradley County Juvenile Court in May 2005, after Mother was arrested for child abuse and neglect. The Juvenile Court's Preliminary Hearing Order cited the following proof:

The Mother slapped [Randy A.] in the face and on the arm resulting in a bloody nose for the child. The children reportedly did not have shoes and were

playing on jagged rocks and throwing [rocks] at cars in Spring Place Road. Three witnesses have given written statements to CPS as to the mother's behavior. One witness, in fact, actually got the children out of the road. The mother was seen yelling and cursing at the people at the house beside the Dollar Store.

The children were taken to Bradley Memorial Hospital for examination. [Cassandra A.] and [Nathan P.] had matted hair, glued together with a sticky substance; [Cassandra A.] had a small oval bruising on her right hip; [Nathan P.] had a[n] older bruising on his face; [Randy A.] had a small circular open wound under his left nostril. All three children's clothes were dirty and the children smelled of body odor.

The Judge noted in his Order that there had been three previous cases of neglect reported involving this family. He expressed continuing concern in view of the fact that Mother had obtained services twice and still lacked parenting skills.

In August 2005, however, the Juvenile Court issued a Divestment Order approving a Plan of Action prepared by DCS, Mother, and her parents, whereby the children were placed in the home of the maternal grandparents. The children were later returned to the custody of Mother by Order of the Court in April 2006.

C. The Present Removal

In January 2008, DCS filed a petition seeking to terminate the Mother's parental rights. The case was tried before the Circuit Court of Polk County in June 2008. During the trial, Barbara Mayer, the Foster Care Case Manager for the children, testified Randy A. came into custody in December 2006, and Nathan P. and Cassandra A. were brought into custody in January 2007. Ms. Mayer noted that she first met Randy A. when he received in-patient care at Valley Hospital for thirteen consecutive months due, in part, to his behaviors of sexual nature. Ms. Mayer testified as follows:

So we discussed where he might have learned such things, because a child of his age shouldn't know. For instance, he would have to be pulled out of class both in Polk County as well as the school at Valley for making sexual noises, and there were noises that one would only make if they were in the presence of sex, more than just like if you saw on TV. It was really as one person put it, the squishy noises. So he would make those in school, and we would discuss where did he learn those things. And he told me that he observed his mother on more than one occasion having sex both on a couch at home, . . . and also he named a gentleman that she had sex with in the residence which was a camper top, . . .

Q. Did he say whether or not his mother knew he was watching?

- A. Yes. He said, "of course she knew." . . .
- Q. Have you spoken with him about his sexual vocabulary?
- A. I've had to discuss it with him on an ongoing basis. He's very verbal and uses a quite derogatory language toward his mother, toward people at all times so we have to discuss that with him at all times, and he said he heard it at home.

She further testified that when the children came into custody, they were slower than their age in maturity level.

As to whether Mother has completed the goals set by DCS, the witness testified as follows:

- Q. Simply from your understanding and your knowledge of [Mother] are you able to say with any certainty that [Mother] has met any of the items that you listed in this letter to her?
- A. In my opinion, I don't believe she has addressed the items under alternative counseling.
- Q. Why not?
- A. She continues to deny even the causes of custody, the reasons for custody, behaviors of the children currently or in the home previously. When we sit and discuss things with her, she doesn't seem to not only understand it, but to really want to. She seems to be more defensive. I have no qualms that she loves her children. I do believe that, but she consistently holds that up as the flag, that she loves her children rather than hear what is going on with her children and you need to be a part of their success and here's what we need to be doing. It always comes back to somebody else's fault, somebody lied, somebody this or that. So she doesn't seem to address that. At one point she will say that the children didn't act like this at home, and then the next sentence she would say that, yes, they had that behavior at home. So things get a little distorted to whatever we're doing on that.

Ms. Mayer further testified regarding Mother's actions at Valley Hospital when visiting Randy A.:

- A. I was told by Valley that she had been wearing inappropriate clothing to the hospital for the visitation. This is a mental health facility with various sexually reactive children and things around, and they asked me to address the issue and I did. And she continued to dress in the same manner. . . . There was midriff showing and, as I recall, a really large belly ring and shirt cut up to here and pants cut down to here

type of thing. So then Ms. Jennifer Morgan and I at Valley along with I believe [Mother] was there at the time, and we talked about it and Ms. Chastain agreed with us that, yes, we didn't need to be dressing like this. And we tried to explain to her that this was inappropriate for visitation with her sexually reactive son, and her reply was that her son would not think of her in that way because that was her son

Ms. Mayer also testified as follows regarding inappropriate touching from Mother to her son:

We tried to explain to her how her son really doesn't understand good touches, bad touches and how his mind doesn't necessarily click that that's his mother, that a sexual reaction is an involuntarily kind of thing and that she needed to be careful about at this point in time touching, undue - - you know hug him when you see him, but during the visit, let's keep our touches to the minimum and things like that. And she just didn't see that at all.

Like when we were doing that meeting at Valley and I was talking about touches and not to give extra touches to [Randy A.], the first thing she did when he walked in the room was rub him under here and say, "Hey, Baby, how are you doing." You know, we said give a hug, and then five minutes later, boom.

Additionally, the witness testified that it was difficult to keep in touch with Mother after the children came into custody. She stated:

- A. She was mobile. She lived - - there was one gentleman she was with that I think lived out of the car for a little while. Then she got back with Mr. Miller or she lived with the first guy's friends for a little while. Then she got back with Mr. Miller, and she was out of pocket for a while. Then they were at the Ocoee Inn for a while, and when I tried to call . . . I couldn't get through there. Now they reside in Bradley County.
- Q. So you weren't able to get through. Has it been difficult to keep in touch with [Mother] ?
- A. Yes. Even though they've been in the same place for a while; the phone number I call frequently is out of service, no minutes or whatever. I remember on one occasion I asked her about that at a visit because I was trying to set up some meetings with her, and she

said that, yes, she had gotten a notice and there were letters at the post office. And I said “Well, you have the gas to get here. The post office is closer than here.” And she said, “Well, I need to go and do that sometime.”

Q. When we left, you were talking about your problems contacting [Mother]. You said that she was now living with Mr. Miller; is that correct?

A. Yes.

Q. Have you been able to see the house where they live?

A. I had gone to the residence on more than one occasion. I had knocked, left my card. I was not able to gain entrance. On occasion I thought that somebody was there, but I have not had occasion to get inside the residence. They have described it to me, and from the outside, the house looks large enough to hold a family.

Q. Do you have any information whether she is on the lease or not?

A. No, I don’t know that yet.

Q. Have you asked her for that information?

A. I’ve asked who lives there. I’ve asked general questions like that. I’ve just not been given that information. Mostly I’m told, “You can get that from my lawyer.”

As to the visits Mother has with the children, the witness testified that, “typically they are chaotic at best.” She observed there is violence between the children that Mother allows without intervening. In contrast, when the father of Cassandra A. and Randy A. visits, the children are well-behaved and non-violent.

Ms. Mayer further testified as to the conditions of the children when they came into custody. She stated that

. . . [w]hen the children came into custody, the two children [Nathan P.] and [Cassandra A.], one of the reasons they came in was unexplained bumps and bruises on [Nathan P.] And there was a host of reasons given, and, although, the children said they were given by mom, she said no, it was a wagon, it was this, that, and the other thing. And then later on she would say that they did it to each other and then say that they never had that.

The witness also related that the following services have been provided for Mother:

Psychosexual evaluation, parenting assessment, sometimes transportation or leading her to these appointments, supervised visitation with some being therapeutic visitation, family counseling with mother and Randy A., individual counseling with two different therapists and case management, and parenting service.

Ms. Mayer concluded her direct testimony by responding to the following question:

- Q. At this point after three custody episodes, can you think of anything that DCS has not done that it could do to try to make this home safe for these children?
- A. I honestly don't think so, and I say that because to comply with Dr. Glennon's recommendation to have a female worker work with [Mother] one-to-one and also to comply with Mary Baker's evaluation that one-to-one counseling would be better than a group or a typical parenting class. When we got Ms. Covington to work with her and she wouldn't be available for appointments and [was] noncompliant so that Ms. Covington had to terminate her services, because there was no sense coming to the home when you can't get people to answer the door. Both Mr. Griffin and I have tried to help her during visitations and it's not taken as advice; it's taken as a threat or ignored completely. . . . I don't think that she fully understands the nature of that child [Randy A.] in that she is in denial about the reason that [Cassandra A.] and [Nathan P.] came into custody. She flatly denies [Nathan P.] running up and down 411; although, I believe it was four occasions he was found doing that. When she goes back and forth on this it is how the children acted and this is not how the children acted, I don't see what I can do, what DCS can do, what the therapists can do that would enable [Mother] to create a safe atmosphere in her home for these children.

Jennifer Morgan Lambert, Randy A.'s case manager at Valley Hospital, testified Randy A. initially had been admitted to the hospital through the emergency room. She noted that while he was in the emergency room, Randy A. was making some very sexualized gestures and "humping" some of the equipment. He exhibited some of the same behaviors at Valley. When asked whether she ever discussed with Randy A. the reason for these behaviors, she testified that

I sat down and talked and just kind of wanted to get his opinion as to why he was in the hospital, and he said he had done some nasty things and some humping things. I went on to ask him to describe if he's ever seen those things, and he talked about that one time he heard his mom having sex with her boyfriend in the living room.

A. And I asked him, "How did you know that your mom was having sex?" And he stated that he heard the couch making noise and he heard his mom making noises like a pig.

A. Later on that day when we talked, I asked him if he had ever seen anybody having sex, and he said that he saw his mom having sex with a man in the living room and another man was sitting in a chair watching. And again I asked him how he knew what they were doing, and he said because she was making those noises.

Ms. Lambert further testified Mother was dressed inappropriately for visitation on several occasions when she came to Valley Hospital to visit Randy A.:

A. She would wear the low cut blue jeans where sometimes her thong would be visible. There were times where she would wear a midriff where her stomach was showing or there were times where a lot of cleavage was exposed. And we talked with her about if she wanted to help her son, that we're really trying to decrease some of the sexual exposure to him and that if she could tone her dress down. That would help us with [Randy A.]

Q. Was she open to that?

A. No, Ma'am, at first she wasn't. She said that she thought she dressed nice and didn't see anything wrong with it.

Irene Covington, a worker at Family Menders, provided parenting and educational services to Mother for about six months. According to Ms. Covington, she tried to educate Mother regarding the sexual issues relating to Randy A. Ms. Covington testified that while she attempted to meet with Mother twice a week, such a schedule was too frequent for Mother. She stated Mother would either tell her she had other things to do or would say she did not want to get up. Ms. Covington also testified as follows:

- A. Initially when we started, she would be there three out of four times a month. Then it got to where she would call me when I was just blocks away and tell me that she couldn't see me. And then after - - probably in the February time it got to be to where she just always had an excuse to not be there or I would go and she wouldn't be there. So I finally terminated for noncompliance.

As to her observation of Mother's interaction with the children, she further testified:

- A. [Mother] would be very flighty. She would hover, stand. She wasn't affectionate as you or I might sit down and want to hug our children. She would bring them presents that were not necessarily age appropriate, because those were the things I would make note of in the observations and then tried to discuss with her. And she would just tell me that I didn't know what I was talking about.
- Q. What about the children's behavior? Was she in control?
- A. No, she was not in control. The children would do whatever they wanted to, and she would just either stand up or walk to the door or call for somebody to come help her but she would not control them.
- Q. Did you address that problem with her?
- A. We attempted to.
- Q. How did she respond?
- A. She didn't - - wouldn't acknowledge it. She would just say that was the way children behave, that there was nothing wrong with the way they behaved.

Ms. Covington also testified regarding her main concern with Mother and what issues she attempted to address with her:

- Q. What was your main concern with [Mother]? What was the main thing that you were trying to address with her?
- A. Parenting. Just the ability to recognize that children need to be kept safe, and I was concerned that with [Randy A.] acting out behaviors, she just did not get it. When we would talk about the sexual things, she would say that never happened. So just complete denial.
- Q. She was denying that [Randy A.] ever sexually acted out?
- A. Yes.
- Q. How many sessions did you have with her?
- A. Maybe 15.
- Q. Over the course of those sessions, based on just talking with her and watching the visitations, was there any improvement in her skills?
- A. No.

- Q. In her ability to understand what to do with the children?
A. No, Ma'am.

Amanda Kozac of DCS testified her involvement with the family began when she received a referral for Nathan P. wandering along Highway U.S. 411 on August 13, 2006, and she continuously worked with the family up until the children were removed from Mother's custody in January 2007. She provided the following testimony about the wandering matter:

- Q. Did you speak to [Mother] about [Nathan P.'s] wandering?
A. Yes, Ma'am. When I went out to the home - - police were actually called to the home. There was a police report done in regards to him wandering. Spoke with several neighbors, and it was reported that this wasn't the first time.
Q. What did you do?
A. I did a plan with [Mother] that she would supervise [Nathan P.] at all times.
Q. What did she say about how he had gotten away?
A. She had said that she was asleep and she can't watch him when she's sleeping, and he got out when she was asleep, but it was no more than five minutes.

Ms. Kozac also testified as follows regarding other issues relating to the children.

- A. There were several issues that came up during the course of the case. [Randy A.] was having a lot of behavioral problems at school at South Polk. We had had two family meetings. One actually was at the school and involved all the school personnel, and we designed a very detailed plan to address that. Also, there were some truancy issues going on regarding [Randy A.] and [Cassandra A.]. And with [Randy A.'s] behavioral problems, we were trying to address those through counseling, and there were some discipline issues that had came up. In September of '06 [Randy A.] had gotten a black eye, and I had gotten various stories in regards to how he had received that black eye.
Q. What did [Randy A.] tell you?
A. [Randy A.] wouldn't say nothing. Whenever I would ask him how he got it, he would just start shaking his head no and shake like his body was shaking. Whenever I spoke to [Cassandra A.], [Cassandra A.] stated that Mommy did it to him. She said, "Mommy hits [Randy A.] in the face all the time."

Ms. Kozac testified as follows concerning when and why Randy A. was brought into custody:

- A. On December 13th there was a hearing with the juvenile court. Because of [Randy A.'s] behavior, the school had brought a petition because of his behavioral issues, yelling obscenities, saying obscenities to classmates and the teacher, his truancy issues.

- A. At the time I reported to the Court with my lack of supervision case I had previously in regards to [Nathan P.] and the various claims that had been done with the mother where she was refusing to do like the parenting classes because she said she didn't have time to do those, she had done them before and she wasn't doing them again because she had to tutor [Cassandra A.] and [Randy A.] for school. Also, she reported even in court under oath that [Nathan P.] had gotten out of the camper several times and wandered off several times. I also reported to the Court the issues with [Randy A.'s] behaviors; that we had the meeting; that there was a family service worker actually in the home. The mother had not been taking him to his counseling like had been required by the Department. She had already missed two appointments with BRI and still had not followed through on the Hiwassee appointment. So at that time [the Judge] brought him into custody as dependent and neglected.

She noted the following regarding the removal of Nathan P. and Cassandra A.:

- A. I received a referral on January 17th that [Nathan P.] had bruising on his face and knots on his head. When I went to Benton Elementary to see [Nathan P.], he had three pump knots on top his head and several bruises on his face that were in various stages of healing and two scratch marks down below on his jaw lines. He wasn't able to give me any type of who did it or what happened, because his verbal skills were very low at that time. Then I went to South Polk to see [Cassandra A.]. [Cassandra A.] also had bruises on her face that were in various stages of healing, and she still had the same bruises on her arm like before that looked like the fingertip marks. When I asked [Cassandra A.] what happened, she said, "Mommy did it." She didn't say how. She just said, "Mommy did it."
- Q. What did [Mother] say?

- A. When I went to the home to speak with [Mother], initially, the excuse that was given as far as the marks on both of the children were that they fight with each other and when they fight, they fight. She said she can't break them up, that they're just on one another and she can't control their fighting. Then when I started asking about the pump knots on [Nathan P.'s] head, when I asked her about those, first she said that he was in her parents' camper and that he got up on the bed and that she couldn't control what he was doing. Then she later said that he had gotten a plastic golf club and just beat his self in the head with it. Now, while I was at the home during this time, [Nathan P.] was also there. [Nathan P.] got one of these plastic golf clubs and started beating himself in the head while I was there, and it didn't leave a red mark or anything. And when I asked her and confronted her about it, She just said, "Well, he just did it and I can't control it. I can't control what he does."
- Q. Did you remove the children that same day?
- A. Yes, I did.

Ms. Kozac further testified Randy A. made disclosures to her about a past history of sexual abuse as follows:

- A. He said, "Mom had a boyfriend named³ _____. He used to baby-sit us all the time. He rubbed my penis under my clothes. I told Mom about it, but she didn't care. He kept coming back around after that."

And I asked him if he ever saw anything else, and he said, "I saw mom and _____ have sex a lot." And I said, "Well, how do you know that they had sex?" He said, "Well, they were naked and she was on top and she was making pig noises." And I said, "Well, what kind of pig noises?" And he started demonstrating pig noises.

And I asked him if anything else ever happened. And he said, "Well, I saw her have sex with other guys and I've seen her have sex with two guys at one time. And I said, "Well, is it just you?" And he said, "Well, [Cassandra A.] was usually there with me and [Nathan P.] watched a few times." I said, "Well, did your mom know you saw these things?" He said, "Yeah. She didn't care if me and [Cassandra A.] watch." He said, "She's even had sex in bed with us laying right there."

So at that time, a month later on the 28th of February, me and the

³ Since there is a serious accusation being made against the boyfriend, we find it inappropriate to list his name in this opinion.

detective talked to [Mother] about these allegations. She said she never has men around when she has her children and she's the only one who ever watches her children. Based on [Randy A.'s] disclosure we indicted her on all three children for severe sex abuse.

Bill Freeman, a licensed professional mental health counselor, saw Mother seven times from January 2007, to August 2007. Mr. Freeman explained Mother felt like he was kind of an extension of either DCS or the court system; therefore, he was never able to gain her trust. He further stated the seven sessions they had were insufficient for him to establish a good rapport with her -- since she did not realize she needed help. He concluded his testimony by saying that "[Mother] has made as much progress with her counseling with me as she's going to make. Her ability for personal insights is limited."

Bertin Glennon, a licensed psychologist, marriage and family therapist, and approved sex offender treatment provider, did a parenting assessment on Mother over a period of two months. Mr. Glennon testified Mother's intellectual age is 8 to 10 years. He concluded Mother has a severe detachment disorder and a deficit in her perception of the behavior of her children. His diagnosis was mild mental retardation under Axis 2 and personality disorder. He noted the Axis 2 diagnosis is least amenable to treatment.

Mr. Glennon further testified regarding the significant and serious emotional and/or psychological harm that the children have endured in addition to the abuse as a result of seeing Mother engaging in various kinds of sex. He expressed strong doubts that Mother could select a boyfriend who would have the best interest of the children in mind. Mr. Glennon concluded Mother could not benefit from therapy; rather, she needed a support system to be available twenty-four hours a day, seven days a week.

Permanency Plans

Since the children have been in the custody of the State, DCS developed four Permanency Plans ("Plan" or "Plans") for Mother dated December 12, 2006, January 29, 2007, August 27, 2007, and March 12, 2008. While the first Plan only concerned [Randy A.], the other three Plans dealt with all three children. The requirements for the August 2007, and March 2008 Plans were essentially the same:

1. Mother will provide a safe, sanitary stable three (3) bedroom home free of all safety hazards and notify DCS of any change in residence within 24 hours. She will ensure that any adult in the home does not have a criminal record or pose any risk to the child[ren]. She will maintain all utilities. She will not conduct herself in a manner that poses a risk either sexual, physical, or emotional to the child[ren].

2. Mother will have a parenting assessment and follow all recommendations. She will ensure that the child[ren] have appropriate adult supervision at all times and that she will consistently demonstrate the ability to adequately supervise the child[ren], control the child[ren]'s behaviors, and model correct parenting skills. She will submit the names of potential caregivers/boyfriends to DCS for background checks.

3. She will furnish DCS with proof of income and expenses. DCS will help her draw up a realistic and functional budget for the family. She will furnish DCS with proof of car insurance and documentation supporting claims of income from government programs. She will find gainful legal employment to supplement her current income should it be necessary to cover all of the family's basic needs. She will notify DCS of any changes in employment within 24 hours.

4. Mother will consistently demonstrate the ability to understand how an unstable relationship affects the children and their environment. She will have a health evaluation and a psychosexual evaluation and follow all recommendations, including individual and family therapy. She will work with [father] to maintain a familial bond with his children. Mother will demonstrate the ability to take responsibility for her negative impact on her children and demonstrate the ability to make and maintain an effective change. Mother will maintain a stable relationship and not expose her children to more than one father figure at a time.

5. Family will actively participate in family and individual therapy to learn and keep appropriate physical boundaries, discipline, and supervision.

6. Mother will furnish DCS with name and demographic information on paramour. The paramour will take a parenting assessment and psychological evaluation and participate in family therapy if requested by therapist. Paramour will conduct himself in a manner that provides safety, structure and nurturing to child[ren]. Paramour will submit to random drug screening. Paramour will demonstrate an understanding of the problems facing the children and be a positive influence on the children and mother. He will accept responsibility to maintain a safe stable home for the children.

The witnesses testified that Mother completed some of the Plans' more tangible requirements, such as providing proof of car insurance and of her monthly social security disability

income for her mild mental retardation. At the time of trial, she had also moved from the camper-top to a three-bedroom house with her fiancé [Mr. Miller]; he described their relationship as “steady.” During the pendency of the Permanency Plans, she also went to four different therapists. However, there were many intangible requirements of the Plans that Mother has not been able to complete.

D. The Ruling in the Trial Court

Following the trial on DCS’s Petition, the Trial Court made detailed and comprehensive findings of fact and ruled, *inter alia*, as follows:

1. That the State has proven by clear and convincing evidence grounds for termination of Mother’s parental rights exist pursuant to Tenn. Code Ann. §§ 36-1-113(g)(2) and 37-2-403(a)(2)(C), substantial non-compliance with statement of responsibilities in the Plan.
2. That the State has proven by clear and convincing evidence that grounds for termination of Mother’s parental rights exist pursuant to Tenn. Code Ann. § 36-1-113(g)(3), that the children have been removed from their home for a period of six months and the conditions that led to the removal continue to exist.
3. That the State has proven by clear and convincing evidence that grounds for termination of Mother’s parental rights exist pursuant to Tenn. Code Ann. § 36-1-113(g)(8), mental incompetence prevents further adequate supervision and care of the children.
4. That the State has proven by clear and convincing evidence pursuant to Tenn. Code Ann. § 36-1-113(g)(8)(B), that termination of parental rights is in the best interest of the children.

Mother filed a timely appeal.

II.

Issues Presented for Review

Mother raises the following issues for review:

- 1. Did the trial court err in finding that the State proved by clear and convincing evidence that Mother failed to substantially comply with the requirements of the Permanency Plans?**
- 2. Did the trial court err in finding that the State proved by clear and convincing evidence that Mother failed to remedy persistent conditions in her**

life that prevented her children's return?

DCS presents an additional issue for review:

1. Did the trial court err in failing to terminate Mother's parental rights based on evidence of severe child abuse?

At the outset, we note that Mother has not challenged the Trial Court's ruling that (1) her mental incompetence prevented her from adequately supervising and caring for the children, pursuant to Tenn.Code Ann. § 36-1-113(g)(8), and that termination of her parental rights was in the children's best interest pursuant to Tenn.Code Ann. § 36-1-113(g)(8)(B). Only one of the statutorily defined grounds is required to be shown to terminate her parental rights when the ground is proven by clear and convincing evidence and termination is found in the child's best interest. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *In re Audrey S.*, 182 S.W. 3d 838, 860 (Tenn. Ct. App. 2005); *In re F.R.R.*, 193 S.W.3d 528, 530 (Tenn. 2006). Thus, even if this court was to find for Mother on all issues presented for review, her parental rights would still be terminated because of these unchallenged rulings of the Trial Court. Nevertheless, this court will address the issues presented by Mother in this appeal.

III.

Standard of Review:

Parents have a fundamental right to the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-579 (Tenn. 1993). This right is superior to the claims of other persons and the government, yet it is not absolute. *In re S.L.A.*, 223 S.W. 3d 295, 299 (Tenn. Ct. App. 2006). A parent's right may be terminated if the petitioner proves by clear and convincing evidence that a statutory ground exists for termination and that termination is in the best interest of the child. Tenn.Code Ann. § 36-1-113(c)(1)&(2); *In re Valentine*, 79 S.W. 3d 539, 549 (Tenn. 2002).

The "clear and convincing" heightened burden of proof in these types of cases ensures that "there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Id.* (citation omitted). The evidence "should produce in the fact finders mind a firm belief or conviction regarding the truth of the proposition sought to be established." *In re A.D.A.*, 84 S.W.3d 726 (Tenn. Ct. App. 2001).

The findings of fact of a trial court are reviewed *de novo* by this court upon the record with a presumption of correctness. Tenn. R. App. P. 13(d). However, whether a statutory ground has been proved by the evidence is a question of law which this court reviews *de novo* with no presumption of correctness. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007) .

IV.

Analysis:

1. **Did the trial court err in finding that the State proved by clear and convincing evidence that Mother failed to substantially comply with the requirements of the Permanency Plans?**

Tenn. Code Ann. § 36-1-113(g)(2) provides, in pertinent part, as follows:

(g) Initiation of termination of parental . . . rights may be based upon any of the grounds listed in this subsection (g), . . .

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, Part 4; . . .

When reviewing termination of parental rights based upon Tenn. Code Ann. § 36-1-113(g)(2), the court must also find that the requirements of the Permanency Plan the parent allegedly did not satisfy are “reasonable and related to remedying the conditions which necessitate foster care placement.” *In re R.L.F.*, 278 S.W. 3d 305, 312 (Tenn. Ct. App. 2008) (citing *In re Valentine*, 79 S.W. 3d at 547).

In the case under review, the Plan, in addition to other requirements, requires “[Mother] will not conduct herself in a manner that poses a risk either sexual, physical or emotional to the child[ren].” It goes without saying that this is a reasonable requirement in that these children have suffered physical harm as a result of Mother’s conduct. Support for this requirement is also demonstrated by Randy A.’s black eye; the testimony that “Mommy hits [Randy A.] in the face all the time”; Nathan P.’s bruising on his face, the knots on his head and scratch marks down below his jaw-line all with no satisfactory explanation as to their origin; and Cassandra A.’s bruising on her face and arm and her statements that “Mommy did it.”

The children have also been subjected to sexual harm. Randy A. and Cassandra A. have acted out sexually abnormal behavior for children their age absent some type of experience with sexually explicit conduct. Additionally, substantial emotional harm has been suffered by these children. Mother has refused to recognize any problems exist and has thus refused to provide any plan or course of action to protect her children or to prevent the recurrence of such problems.

The Plan also provides that “[Mother] will ensure that the child[ren] have appropriate adult supervision at all times and that she will consistently demonstrate the ability to adequately supervise the child[ren], control the child[ren]’s behaviors and model correct parenting skills.” These children

have been placed at risk of serious harm as a result of inadequate supervision by Mother. For instance, Nathan P., at a very young age, was found wandering around U.S. Highway 411 on more than one occasion while Mother was asleep. Additionally, the younger children have been the target of Randy A.'s physical violence and all of the children have suffered physical violence at the hands of Mother. Accordingly, this is a reasonable requirement in the Plan to protect these children. Mother, however, has refused to participate in parenting classes and was terminated for non-compliance from one-on-one services by Family Menders.

The Plan further requires "Mother will demonstrate the ability to take responsibility for her negative impact on her children and demonstrate the ability to make and maintain an effective change." These children have suffered tremendously because of Mother's behavior. This record is full of various incidents substantiating Mother's derelict conduct and the suffering of these children as a result of same. This requirement is reasonable. The witnesses testifying at trial have stated that Mother just does not seem to understand or, "she just didn't get" how her actions and conduct negatively impacted her children. Since Mother cannot understand how her actions have hurt her children, she obviously has not made any changes and, as a result, her activities will continue; her children, if in her custody, will suffer.

The Plan also provides, "the family will actively participate in family and individual therapy to learn and keep appropriate physical boundaries, discipline and supervision." Appropriate physical boundaries, discipline, and supervision are clearly needed in this family. A glaring example of this is shown by the violence and inappropriate touching between the children, and the physical violence by the Mother toward the children. This Plan requirement is reasonable and is desperately needed in order for this family to exist as a family unit. Mother, however, has failed to make a reasonable and meaningful effort to participate in therapy. She was dismissed for non-compliance from one therapist, with the mental health counselor concluding, "Mother has made as much progress with her counseling with me as she is going to make. Her ability for personal insight is limited."

The Trial Court found by clear and convincing evidence that these requirements of the Plan were reasonable and related to remedying the conditions which necessitated the removal of these children from their home. The Court further found by clear and convincing evidence that Mother was substantially non-compliant with these requirements. These findings are fully supported by the records. We, therefore, affirm the Trial Court's findings that these requirements of the Plan are reasonable and that they are related to remedying the conditions that necessitated the removal of these children from their home. We further affirm the Trial Court's findings that Mother is substantially non-compliant with these requirements of the Plan.

Mother, however, contends that she did obtain better living accommodations, showed proof of her SSI income and car insurance, visited the children, was in a steady relationship with one man, underwent psychological evaluations and parenting assessments, and made some breakthroughs as to the understanding of her relationship with her children. She considered her achievements to be substantial.

While we applaud Mother for the accomplishments she has made, we cannot consider these perfunctory accomplishments to be substantially in compliance with the Plan requirements. Mother has failed to understand why her children were brought into State custody in the first place; thus, she does not appear to see any reason why her personal behavior should change. The requirements of the Permanency Plan include the ability to adequately supervise the children, model correct parenting skills, and demonstrate personal responsibility. Without these goals being met, other improvement by Mother is insufficient. After a thorough and complete review of the record and the proof, we find the evidence clearly and convincingly supports the findings of the Trial Court.

Mother takes issue with the weight the Trial Court placed on the intangible and introspective factors in determining whether substantial noncompliance exists. Whether there has been substantial noncompliance is a question of law that we review with no presumptions of correctness. *In re Valentine*, 79 S. W. 3d at 548.

The Plans contain a mix of tangible and intangible goals for a reason: successful parenting clearly consists of much more than a superficial check list of concrete, palpable tasks. This court feels that parenting also requires a multitude of less measurable qualities such as introspection, empathy, maturity, and responsibility. While such qualities may be more difficult to assess, in our view, they are just as important as the more readily quantifiable aspects of parenting. It is true that Mother has made some positive steps towards taking control of her life and improving her living conditions within the framework of the Plans. Nevertheless, the record shows a total deficiency in Mother's ability to meet many of the intangible requirements, such as showing introspection into sexual responsibility, modeling correct parenting skills, and demonstrating the ability to adequately supervise her children and control their behaviors. Furthermore, the record also indicates very little growth or progress towards meeting these requirements.

"Substantial non-compliance" is measured by both the weight assigned to a particular requirement in the permanency plan and the degree of non-compliance. *Id.* at 548. Considering the facts of this case, in this instance, this court must give as much weight to the Plan's non-tangible factors as to those that can be easily measured. To do otherwise would be a disservice to the children. We find that the combined weight of the individual facts provides clear and convincing evidence that Mother failed to comply with the reasonable intangible requirements of the Plan that were directed to remedy the conditions which necessitated the removal of the children from their home. As a result, this court affirms the Trial Court's decision that Mother failed to substantially comply with the Plan.

2. Did the trial court err in finding that the State proved by clear and convincing evidence that Mother failed to remedy persistent conditions in her life that prevented her children's return pursuant to Tenn. Code Ann. § 36-1-113(g)(3)(A),(B)&(C)?

The provisions of Tenn. Code Ann. § 36-1-113(g)(3)(A),(B)&(C) state that termination of parental rights is appropriate when:

(3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Termination of parental rights requires clear and convincing evidence of all three factors noted above. *In re Valentine*, 79 S.W.3d at 550.

Factor (A):

There is no dispute that all three children had been removed for at least six months from the home of Mother by order of a court.

Mother argues that she has remedied the conditions that led to removal based on the tangible steps she took to comply with the Plans. She also contends that "no such evidence" exists in the record that shows a continuation of the parent-child relationship would diminish her children's integration into a stable home.

DCS, on the other hand, reiterates that Mother has failed to successfully tackle the fundamental issues of child supervision, parenting skills, and personal responsibility. As a result, a return to Mother's care would in all likelihood cause the children to be subjected to further abuse or neglect. DCS further contends that the apparent inability of Mother to adopt better parenting skills forecloses any possibility that the conditions that led to removal would be remedied in the near future. Finally, DCS contrasts the children's poor behavior around Mother with their improved behavior around their father and in their foster homes. DCS claims that this discrepancy shows that a continuation of the parent-child relationship greatly diminishes the children's chances of early integration into a safe, stable and permanent home.

Based on this court's analysis concerning the substantial noncompliance with the Plans, we are obligated to affirm the Trial Court's holding that the State proved by clear and convincing evidence that Mother failed to remedy persistent conditions in her life that prevented her children's return pursuant to Tenn. Code Ann. § 36-1-113(g)(3). Regarding factor (A), we agree with the

findings of the Trial Court that conditions in the home would lead to further abuse or neglect. Mother's inability to control her children, combined with her lack of introspection into the root causes of her problems, clearly and convincingly reveals a substantial risk of continued abuse and neglect if the children were reunited with Mother. After each reunification attempt, the children have been in worse shape.

Factor (B):

Concerning factor (B), the Trial Court noted that Mother's "mental condition is impaired and is so likely to remain impaired at a level that she will probably not be able to resume the care and responsibility for the children in the near future." Mother would have to show substantial progress towards remedying her parental shortcomings for there to be a likelihood of a return of the children. The record convincingly shows Mother's inability to respond positively to psychological treatment or parental training. Thus, clear and convincing evidence reveals that there is little likelihood of a successful return of the children to Mother in the near future.

Factor (C):

Turning to factor (C), the record clearly and convincingly shows that the children's behavioral problems are exacerbated when they are in the presence of Mother. The Trial Court noted that "the meaningful relations between her and her children are strained." The children's words and actions around Mother contrast markedly with their behavior in their foster environments. Also, her continued denial of the root problems underlying her parenting greatly diminishes the children's chances of early integration into a safe, stable and permanent home.

Based on our review of the above three factors, we affirm the Trial Court's ruling that DCS has proved by clear and convincing evidence that grounds for termination exist pursuant to Tenn. Code Ann. § 36-1-113(g)(3)(A),(B)&(C).

3. Did the trial court err in failing to terminate Mother's parental rights based on evidence of severe child abuse?

While the Trial Court found that there was sufficient evidence presented for a finding of severe abuse, it declined to conclusively rule on the matter since DCS had not alleged that ground. DCS, on the other hand, contends that the Trial Court did, in fact, allow an oral modification of the termination petition during trial to add the ground of severe abuse. We, too, find that there was sufficient evidence presented for a finding of severe abuse. However, since the Trial Court declined to rule on this issue, we will do the same. Any ruling we would make on this issue would not effect the outcome of this appeal.

V.

Conclusion:

1. The Judgment of the Trial Court finding that DCS proved by clear and convincing evidence that Mother failed to substantially comply with the requirements of the Permanency Plans is affirmed.
2. The Judgment of the Trial Court finding that DCS proved by clear and convincing evidence that Mother failed to remedy persistent conditions in her life that prevented her children's return is affirmed.
3. The action of the Trial Court to not rule upon the termination of Mother's parental rights based on evidence of severe child abuse is affirmed.

Thus, the Judgment of the Trial Court is affirmed in its entirety. Costs on appeal are taxed to the Appellant. The case is remanded to the Trial Court for enforcement of the court's judgment and for collection of costs assessed below, pursuant to applicable law.

JOHN W. McCLARTY, JUDGE

